No. 04-563

IN THE SUPREME COURT OF THE UNITED STATES

DENEICE A. MAYLE, Warden, *Petitioner,*

v.

JACOBY LEE FELIX, *Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
ROBERT R. ANDERSON
Chief Assistant Attorney General
MARY JO GRAVES
Senior Assistant Attorney General
JANET E. NEELEY
WARD A. CAMPBELL
Supervising Deputy Attorneys General
MATHEW CHAN
Deputy Attorney General
Counsel of Record
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5232
Fax: (916) 324-2960
Counsel for Petitioner

QUESTION PRESENTED

When a habeas petitioner challenging a state judgment amends his petition to include a new claim, does the amendment relate back to the date of the filing of his petition and thus avoid the one-year statute of limitations, 28 U.S.C. § 2244(d)(1), so long as the new claim stems from the prisoner's trial, conviction, or sentence?

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OPINIONS BELOW

The opinion of the United States Court for Appeals for the Ninth Circuit (Ninth Circuit) is reported as *Felix v. Mayle*, 379 F.3d 612 (9th Cir. 2004). (J.A. 5-22.)

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit was entered on August 9, 2004. The petition for writ of certiorari was filed on October 25, 2004, and granted on January 7, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND FEDERAL RULES INVOLVED

The statutory provisions and federal rules involved are as follows: 28 U.S.C. §§ 2244(d), 2254(b); Rule 11 of the Rules Governing Section 2254; Federal Rules of Civil Procedure 13(a), 15(a) & (c), 81(a)(2). These provisions and rules are

printed in the appendix at the end of this brief.

STATEMENT OF THE CASE

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") established a one-year limitations period for the filing of federal habeas corpus petitions challenging federal and state convictions and sentences. Pub. L. No. 104-132, Stat. 1214; 28 U.S.C. § 2244(d)(1), § 2255. At issue in this case is the application of that limitations period when a state petitioner timely files his initial habeas petition, but then amends the petition after the limitations period has expired and adds a new and unrelated claim. Is the new claim time-barred or does it "relate back" to the original petition under Federal Rule of Civil Procedure 15(c)(2), which provides for the relation back of an amendment of a pleading when "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading"?

1. In 1995, Jacoby Lee Felix was tried in Sacramento, California, for a 1993 robbery/murder. During trial, portions of a videotaped interview between Detective Toni Winfield and Kenneth Williams, conducted on February 4, 1994, were played for the jury. (Tr. 533-537, 539, 543, 548, 550, 753-755.) In addition, Detective Jeffrey Gardner testified as to statements Felix made to Detective Winfield and himself on October 28, 1993.[1/] (Tr. 4, 30, 722-732.) Felix was convicted of first degree murder with the "special circumstance" that the murder occurred during the course of the robbery, and second degree robbery. He was sentenced to life imprisonment without the possibility of parole. (Pet. App. C1-2, E1-2.)

On appeal, Felix argued in part that admission of the

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1. The trial court had denied Felix's pretrial motion to suppress his statements. (Tr. 4-5, 26-33, 44-46.)

extrajudicial statements of Kenneth Williams violated his constitutional right to confront witnesses. However, Felix did not contest the use of his own statements to the police. (Pet. App. E.) The state's intermediate court affirmed the judgment. (Pet. App. E.) The California Supreme court denied Felix's petition for review. (Pet. App. F.)

2. On May 8, 1998, Felix filed in the United States District Court, Eastern District of California, a timely in pro per petition for writ of habeas corpus under 28 U.S.C. § 2254, which contained fully exhausted claims, including a Confrontation Clause claim based on the trial court's admission of statements from Kenneth Williams. (Pet. App. G.) Three weeks later, the district court appointed the Federal Defender to represent Felix. (Pet. App. C6.) The district court held a pretrial conference and thereafter set a briefing schedule. (Pet. App. H3.)[2/]

On August 12, 1998, the one-year period of limitations provided by the AEDPA expired. (Pet. App. C9-10, citing 28 U.S.C. § 2244(d)(1).) Over five months later, on January 28, 1999, Felix filed an amended petition, which omitted all but one of the claims in the original habeas petition. (Pet. App. I.) In Claim Two of the amended petition, Felix repeated his Confrontation Clause claim. In Claim One of the amended petition, Felix asserted for the first time the unexhausted claims that (1) the state court violated his right to due process and his right against self-incrimination by admitting into evidence his purportedly involuntary statements to the police and (2) he was denied effective assistance of counsel because his appellate attorney had failed to raise that claim.

Deneice A. Mayle ("the Warden") filed a motion to dismiss the "mixed" amended petition. (Pet. App. H5.) While that motion was pending, Felix exhausted Claim One in state court.

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2. In ordering that the amended petition be filed within a specified period, the court noted that the petitioner already had the benefit of a few months to work on an amended petition, "if a substantive one is necessary." (Order filed on September 15, 1998.)

The Warden thereafter filed an answer to the fully exhausted amended petition. (Pet. App. C7; Pet. App. H8.)

On July 1, 2002, the district court denied the Confrontation Clause claim on the merits and denied the newly added claims relating to Felix's statements as barred by the AEDPA's statute of limitations. (Pet. App. C, D, H12-13.) The court explained that Felix's new involuntary statement claim did not "relate back" to the timely-filed petition under Federal Rule of Civil Procedure 15(c)(2) because the claim did not arise "out of the conduct, transaction, or occurrence set forth . . . in the original pleading." (Pet. App. D5-9.) The court observed that the involuntary statement claim and the Confrontation Clause claim did not arise from the "same core of facts," and noted that, "[o]bviously, the theories and facts of the claims are distinct." (Pet. App. D8-9.)

3. The United States Court of Appeals for the Ninth Circuit, in a 2-1 decision, reversed the district court's ruling that Claim One was time-barred. The majority explained that "a prisoner's new claim arises out of the same transaction or occurrence as his original petition because the transaction or occurrence in issue is his state trial and conviction."[3/] (J.A. 8.) The court stated that "[w]e accordingly disagree, respectfully, with the decisions of several circuits that deny relation back under Rule 15(c)(2) when a new claim rests on a theory or facts within a trial not raised in the original habeas petition." (J.A. 11-12.)

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3. The Ninth Circuit stated its agreement with *Ellzey v. United States*, 324 F.3d 521 (7th Cir. 2003). (J.A. 11.) In *Ellzey*, the Seventh Circuit addressed whether added arguments based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), related back to a timely-filed § 2255 motion that included a claim that counsel's performance with respect to sentencing was subpar. *Ellzey*, 324 F.3d at 525. The court concluded that the added arguments related back, stating that "[a] prisoner who comes up with ten different ways to contest his sentence still is litigating about a single transaction or occurrence (the supposedly unlawful sentence), so an amendment necessarily relates back under Rule 15(c)(2)." *Id.* at 525-26.

Responding to the other circuits' concern that its interpretation "would erode the effectiveness of AEDPA's one-year statute of limitations," the Ninth Circuit stated that the petitioner still must file his original petition within the limitations period. (J.A. 12.) The court opined that "precluding relation back of new claims effectively nullifies Rule 15(c)(2) in habeas proceedings," (J.A. 12), and suggested that Federal Rule of Civil Procedure 15(a) would serve to curb the abuse of the relation back doctrine. (J.A. 13.) The court also rejected the contention that its rule violates the policy of Rule 15(c) that the non-moving party have fair notice of the claims added by amendment. (J.A. 13-14.)

Judge Tallman dissented and expressed his agreement with the circuits that had rejected the broad application of the relation back doctrine to amended habeas petitions. He noted that "[t]he 'relation back' doctrine is not easily applied to habeas corpus petitions." (J.A. 17.) He observed that the majority obliterated the AEDPA period of limitations by defining "conduct, transaction, or occurrence" at such a "'high level of generality'" that "any claim stemming from pre-trial motions, the trial, or sentencing" would relate back to a timely-filed habeas petition. (J.A. 17-18.) Judge Tallman also found that the court's rule undermines the fair-notice policy underlying Rule 15(c), because "the original petition utterly failed to give fair notice to the State of the petitioner's new claim." (J.A. 20.) Judge Tallman instead endorsed the approach enunciated by the Eleventh Circuit in *Davenport v. United States*, 217 F.3d 1341, 1344 (11th Cir. 2000): "In order to relate back, the untimely claim must have arisen from the 'same set of facts' as the timely filed claim, not from separate conduct or a separate occurrence in 'both time and type.'" (See J.A. 19.)

SUMMARY OF ARGUMENT

Federal Rule of Civil Procedure 15(c)(2) allows a new claim in an amended pleading filed after a limitations period has expired to relate back to a timely filed pleading when the new claim arose out of the "conduct, transaction, or occurrence" as claims asserted in the original pleading. This case presents two choices as to how the "conduct, transaction, or occurrence" limitation of Rule 15(c)(2) applies to new claims amended to federal habeas corpus petitions. One option is that chosen by the Ninth Circuit, which construes "conduct, transaction, or occurrence" in a way that allows any new claim that stems from the petitioner's trial, conviction, and sentence to relate back under Rule 15(c)(2). The other option, adopted by numerous other courts of appeal and advocated by the Warden, is to construe "conduct, transaction, or occurrence" as the facts underlying the specific claims asserted in the original petition. Thus, for example, under the Ninth Circuit's rule, a new claim that the court left out an element of the offense in its instructions to the jury would relate back to an original claim that defense counsel had been ineffective in advising the defendant regarding a proffered plea bargain. Under the option advocated by the Warden, it would not.

1. The Ninth Circuit's rule is the wrong one for several reasons. First, defining Rule 15(c)(2)'s "conduct, transaction, or occurrence" so broadly as to include "any claim stemming from pre-trial motions, the trial, or sentencing" (J.A. 17), the Ninth Circuit has rendered the limiting parameters of the relation back rule meaningless in habeas cases. The exception would swallow the rule. Rule 15(c)(2) would essentially provide that all claims in a habeas corpus challenge to a conviction or sentence relate back to the original date of a timely filed habeas petition. This undermines the AEDPA one-year limitations period. AEDPA was enacted to reduce delay in the execution of state and federal judgments and to further promote the principals of comity, finality and federalism.

AEDPA's one-year statute of limitations reduces the potential for delay on the road to finality by restricting the time in which an inmate can seek federal habeas review. Yet under the Ninth Circuit rule, a habeas petitioner could file a minimal petition to serve as a "placeholder" to gain more time to develop claims, which the petitioner could then exhaust in state court before adding them to the federal petition. This renders the limitations period ineffective. It also facilitates piecemeal litigation and effectively allows the pendency of the federal petition to toll the limitations period, in direct contravention of *Duncan v. Walker*, 533 U.S. 167, 180-81 (2001).

Rule 11 of the Rules Governing Section 2254 ("Habeas Rule 11") provides that the Federal Rules of Civil Procedure "may be applied" only "to the extent they are not inconsistent with any statutory provisions or these rules." Because the Ninth Circuit's interpretation of Rule 15(c) undermines AEDPA's limitations period and tolling provision, and the policies that underlie them, Habeas Rule 11 proscribes that interpretation. The inconsistency between the Ninth Circuit's rule and AEDPA is not made irrelevant (as the Ninth Circuit asserted) by the district courts' discretion under Rule 15(a) to deny leave to amend petitions. Many amendments are allowed as of right; and as to others, Congress could not have intended the limitation period to apply at the discretion of district courts under Rule 15(a).

2. The Ninth Circuit's broad interpretation of "conduct, transaction, or occurrence" also violates Rule 15(c)'s underlying policy of giving fair notice of new claims. The Ninth Circuit's construction of Rule 15(c) wrongly assumes that the filing of an initial habeas petition puts states on notice of all possible claims stemming from the case. Given the wide variety of claims that can arise from a trial, conviction, and sentence, that assumption is utterly untenable—especially where, as here, the new claim had not even been exhausted in state courts at the time it was amended to the petition.

By contrast, the narrower interpretation of "conduct,

transaction, or occurrence" adopted by a number of circuits and advocated by the Warden is consistent with Rule 15(c)'s fair notice policy. It will not render Rule 15(c)(2) inapplicable in habeas corpus proceedings. It does not deny state prisoners their chance to present all their claims in federal court. It does, however, allow AEDPA's statute of limitations period to function effectively—*i.e.*, to preclude habeas petitioners from raising brand new claims based on a completely different set of facts after the statute of limitations has expired.

ARGUMENT

IN THE CONTEXT OF HABEAS CORPUS, FEDERAL RULE OF CIVIL PROCEDURE 15(c)(2) IS NOT PROPERLY READ TO ENCOMPASS ANY AND ALL CLAIMS THAT STEM FROM THE PRISONER'S TRIAL, CONVICTION, OR SENTENCE

A. The Ninth Circuit's Expansive Reading of Rule 15(c)(2) Significantly Undermines The Purposes Of AEDPA's Statute Of Limitations

While habeas corpus proceedings have been characterized as "civil," the "label is gross and inexact." *Harris v. Nelson*, 394 U.S. 286, 293-94 (1969). "Essentially, the proceeding is unique." *Id.* at 294. Unlike a typical civil case, which may first spring to life with the filing of a complaint in federal court, "[h]abeas corpus litigation is, by definition, a collateral attack on the finality of a criminal judgment following direct appeal or a conscious decision to forgo direct attack." (J.A. 17.) Accordingly, "habeas corpus is . . . not automatically subject to all rules governing ordinary civil actions." *Schlanger v. Seamans*, 401 U.S. 487, 490 n.4 (1971). Habeas Rule 11 provides that the Federal Rules of Civil Procedure apply to the

extent they are not inconsistent with any statutory provisions or the habeas rules. See also Fed. R. Civ. P. 81(a)(2).

Rule 15(c)(2), as construed by the Ninth Circuit, is precisely the sort of rule of civil procedure that Habeas Rule 11 contemplates not applying on habeas. From its inception, the purposes of the writ of habeas corpus "were tempered by a due regard for the finality of the judgment of the committing court." *Schneckloth v. Bustamonte*, 412 U.S. 218, 255-56 (1973) (Powell, J., concurring). This regard for finality was most recently advanced in AEDPA, which was designed to prevent federal habeas petitioners from unduly delaying the finality of their court judgments. *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) ("Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, . . . and 'to further the principles of comity, finality, and federalism' . . . .") (quoting *Williams v. Taylor*, 529 U.S. 420, 436 (2000)). One of the principal ways by which AEDPA sought to accomplish that objective was its creation of a one-year period of limitations, which is subject to tolling in specified circumstances.

The Ninth Circuit's so-called "literal" application of Rule15(c)(2) to habeas proceedings (J.A. 10) runs afoul of the principles which inform habeas corpus practice by undermining the limitations period and effectively rewriting the tolling provision. It thereby promotes delay in the finality of state court judgments. Habeas Rule 11 proscribes application of Rule 15(c)(2), so construed, to habeas proceedings.

Not surprisingly, then, a majority of circuits—the Third, Fourth, Eighth, Tenth, Eleventh and District of Columbia—have rejected the broad interpretation of "conduct, transaction, or occurrence" advanced by the Ninth Circuit.[4/] These circuits

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4. *E.g.*, *United States v. Hicks*, 283 F.3d 380, 389 (D.C. Cir. 2002); *Williams*, 263 F.3d at 1142; *McKay v. Puckett*, 255 F.3d 660 (8th Cir. 2001) (per curiam); *Espinoza-Saenz*, 235 F.3d at 505; *Davenport v. United States*, 217 F.3d 1341, 1346 (11th Cir. 2000); *Pittman*, 209 F.3d at 317-18; *United*

have followed a rule that is consistent with AEDPA, namely, limiting amendments to claims arising from the "same set of facts" as the timely filed claims, but prohibiting amendments with claims pertaining to events separate in "both time and type."[5/]

This Court should adopt that construction of Rule 15(c)(2).

1. The Ninth Circuit's Reading Would Allow Prisoners To Engage In An "End Run" Around The Statute Of Limitations By Belated Addition Of Unrelated And Untimely Claims To A "Placeholder" Petition

For state prisoners, AEDPA imposes a one-year period of limitations that runs from the finality of the state judgment (as it did in this case; Pet. App. C9-10), or from a later date under specified circumstances. 28 U.S.C. § 2244(d)(1)(A)-(D). In *Duncan v. Walker*, 533 U.S. at 179, this Court explained the objectives of the statute of limitations:

States v. Duffus, 174 F.3d 333, 335-38 (3rd Cir. 1999); *United States v. Craycraft*, 167 F.3d 451, 457 (8th Cir. 1999). There appears to be a split of authority within the Seventh Circuit. In *Rodriguez v. United States*, 286 F.3d 972 (7th Cir. 2002), a case decided before *Ellzey*, the Seventh Circuit noted cases that expressed the majority view regarding the relation back rule before concluding that the "issues and facts" underlying a new claim sought to be added by amendment did not relate back to the ineffective assistance of counsel claims asserted in the original petition. *Id.* at 980-81.

5. Accordingly, the Warden does not contend that Rule 15(c)(2) never applies to habeas petitions. 28 U.S.C. § 2242 ("Application for a writ of habeas corpus . . .. may be amended or supplemented as provided in the rules of procedure available to civil actions.").

> The 1-year limitation period of § 2244(d)(1) quite plainly serves the well-recognized interest in the finality of state court judgments. . . . This provision reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review.

Rule 15(c) sets forth a relation back rule "to ameliorate the effect of the statute of limitations." 6A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1497, at 85 (2d ed. 1990). The rule does so, however, not by shielding *all* new claims from the limitations periods, but by shielding only a specified set of new claims. Under Rule 15(c)(2), "amendment of a pleading relates back to the date of the original pleading when . . . the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(c); *see Farris v. United States*, 333 F.3d 1211, 1215 (11th Cir. 2003) ("Congress intended Rule 15(c) to be used for a relatively narrow purpose. . . ."); *Fuller v. Marx*, 724 F.2d 717, 720 (8th Cir. 1984) (Rule 15(c) does not contemplate depriving the responding party of the protection of the statute of limitations).

By broadly interpreting Rule 15(c)(2)'s "conduct, transaction, or occurrence" to allow relation back of "any claim stemming from pre-trial motions, the trial or sentencing" (J.A. 17), the Ninth Circuit has stretched the limiting parameters of the relation back rule past the breaking point. It is difficult to imagine a claim made in a habeas corpus petition challenging a conviction or sentence that will not relate in some fashion to the trial, conviction or sentence. Thus, under the Ninth Circuit's rule, there are no restrictions to the relation back of claims for these habeas cases—*all* new claims will relate back to a timely-filed petition. This takes the "teeth" out of AEDPA's statute of limitations by giving prisoners the right to assert claims on habeas years after direct review has ended.

The Ninth Circuit apparently does not dispute that its interpretation of Rule 15(c)(2) would allow relation back of virtually all claims in habeas proceedings. The court justified this outcome by observing that AEDPA requires the filing of a petition within the one-year limitation period, meaning there still has to be a timely petition to which a new claim can relate back. (J.A. 12.) That response is wholly inadequate. The requirement of filing a timely petition would no longer serve the purposes of AEDPA (to reduce delay and to promote finality) if federal habeas proceedings could then be stalled by the addition of new—and possibly unexhausted—claims after expiration of the statute of limitations. The Ninth Circuit's holding would allow a habeas petitioner to file a "placeholder" petition within the limitations period merely to keep the door open, allowing him to take additional time to develop other claims to add into his petition without having to worry about a future time bar. It lets a habeas petitioner do an "end run" around the statue of limitations and renders it ineffective.

Judge Wilkinson aptly summed up the problem in *United States v. Pittman*, 209 F.3d 314, 317-18 (4th Cir. 2000):

> The fact that amended claims arise from the same trial and sentencing proceeding as the original motion does not mean that the amended claims relate back for purposes of Rule 15(c). If we were to craft such a rule, it would mean that amendments to a § 2255 motion would almost invariably be allowed even after the statute of limitations had expired, because most § 2255 claims arise from a criminal defendant's underlying conviction and sentence. Such a broad view of "relation back" would undermine the limitations period set by Congress in the AEDPA.

See also United States v. Espinoza-Saenz, 235 F.3d 501, 505 (10th Cir. 2000) ("because a majority of amendments to § 2255 motions raise issues which relate to a defendant's trial and sentencing, to allow amendment under the broad umbrella

would be tantamount to judicial rescission of AEDPA's statute of limitations period").[6/]

2. The Ninth Circuit's Reading Effectively Nullifies This Court's Construction Of AEDPA's Tolling Provision, 28 U.S.C. § 2244(d)(2), In *Duncan v. Walker*

The overly broad relation back rule adopted by the Ninth Circuit is also contrary to this Court's specific holding in *Duncan v. Walker*. In *Duncan*, this Court held that the filing of an application for federal habeas corpus review did not toll the limitations period during the pendency of the state prisoner's first federal habeas petition. 533 U.S. at 181-82. The Court observed that a contrary position "would further undermine the interest in finality by creating more potential for delay in the adjudication of federal law claims." *Id.* at 180. Elaborating, the Court explained:

> A diminution of statutory incentives to proceed first in state court would also increase the risk of the very piecemeal litigation that the exhaustion requirement is designed to reduce. . . . We have observed that "strict enforcement of the exhaustion requirement will encourage habeas petitioners to exhaust all of their claims in state court and to present the federal court with a single habeas

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6. The Ninth Circuit correctly noted that the reasoning expressed in federal inmate cases under 28 U.S.C. § 2255 applies equally to cases that challenge state convictions under 28 U.S.C. § 2254. (App. A4 n.1; *accord*, *Woodward v. Williams*, 263 F.3d 1135, 1142 (10th Cir. 2001) (in applying *Espinoza-Saenz,* 235 F.3d 501, to a state prisoner petition under 28 U.S.C. § 2254, the court stated, "we see no reason to treat the issue differently"); *see also United States v. Cicero*, 214 F.3d 199, 203 n* (D.C. Cir. 2000) ("Courts have generally applied the same analysis to the time limitations in § 2254 and § 2255").

> petition." . . . But were we to adopt respondent's construction of § 2244(d)(2), we would dilute the efficacy of the exhaustion requirement in achieving this objective. . . .

Id. AEDPA's purpose, and various provisions therein, "encourage litigants to *first* exhaust all state remedies and *then* to file their federal habeas petition as soon as possible." *Id.* at 181. The Ninth Circuit rule defeats that purpose.

While the Ninth Circuit's rule does not explicitly provide that the filing of a federal habeas petition tolls the period of limitations, an outcome rejected by *Duncan*, it effectively does the same thing. Under the Ninth Circuit rule, a habeas petitioner who files a timely initial federal habeas petition gains additional time to develop more claims; the habeas petitioner can go back to state court to exhaust the newly developed claims and thereafter raise them in federal court by adding them into his federal habeas petition after AEDPA's limitations period has already expired. And there is no statutory limit to the number of times this can be done. The habeas petitioner can use the federal district court as a "parking spot" while he bypasses the period of limitations with new claims. Such application of Rule 15(c)(2) permits the type of piecemeal litigation criticized in *Duncan*. It thus undermines the interest in finality "by creating more potential for delay in the adjudication of federal law claims." *Duncan*, 533 U.S. at 180.

The Ninth Circuit posits that a state prisoner has "very considerable incentive" to file all of his claims in the original petition or as soon as possible thereafter because a delay may result in final judgment being entered on the unamended petition. (J.A. 12 n.2.) But as Judge Tallman pointed out in his dissent, "the court underestimates the amount of time required by our district judges to consider and resolve habeas petitions." (J.A. 19 n.2.) A Department of Justice study shows that, on average, it takes 477 days to dispose of a habeas petition on the merits. See U.S. Dept. of Justice, Office of Justice Programs,

Bureau of Justice Statistics, Federal Habeas Corpus Review: Challenging State Court Criminal Convictions 23-24 (1995); *Duncan*, 533 U.S. at 186 (Breyer, J., dissenting) (noting that same study shows that "of all habeas petitions, nearly half were pending in the district court for six months or longer; 10% were pending more than two years"). It cannot be presumed that state inmates are unaware that federal habeas petitions take considerable time to resolve.

Here, Felix filed an amendment to his original petition, which contained an unexhausted claim. That resulted in the filing of a motion to dismiss, which thereafter became moot when the state court denied Felix's claim. (Pet. App. C6-7.) Whether it was Felix's intent, the amendment and exhaustion process delayed the filing of an answer to his petition.[7/] *See Duncan*, 533 U.S. at 186 (Breyer, J., dissenting) (noting that the above-mentioned Justice Department study reflects that "on the average, district courts took 268 days to dismiss petitions on procedural grounds").

As this Court observed in *Pliler v. Ford*, ___ U.S. ___, 124 S. Ct. 2441, 2446 (2004), "it is certainly the case that not every litigant seeks to maximize judicial process." Delay works to the advantage of a condemned inmate whose only viable challenge is to the validity a capital sentence. *See Pliler v. Ford*, 124 S. Ct. at 2451 (Breyer, J., dissenting) (observing that "[t]hose under a sentence of death might welcome delays"). Application of Rule 15(c)(2) to allow all claims arising from a condemned inmate's trial, conviction or sentence to relate back to a timely filed petition will give such condemned inmates incentive to practice piecemeal litigation for purposes of delay. And delay in challenges to state convictions, especially in capital cases, is exactly what AEDPA was intended to eliminate. *Garceau*, 538 U.S. at 206.

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7. In this case, the exhaustion process took over three-and-one-half months. (Pet. App. C7.)

3. Contrary To The Ninth Circuit's Contention, The Effectuation Of Congress' Purpose In Enacting AEDPA's Statute of Limitations Cannot Be Left To The Discretion Of District Judges Under Rule 15(a)

The Ninth Circuit implicitly recognized that its broad holding was problematic when it echoed *Ellzey's* assurance that "abuses of Rule 15 can be controlled by the district court under subsection (a), which requires leave of court to file an amendment after a responsive pleading has been filed." (J.A. 13.) Rule 15(a) does nothing, however, to relieve the inconsistency between Rule 15(c)(2), as interpreted by the Ninth Circuit, and AEDPA.

As an initial matter, Rule 15(a) allows a party to amend its pleading as of right "at any time before a responsive pleading is served." Fed. R. Civ. P. 15(a). When a new claim is added through an amendment as of right, Rule 15(a) does *not* give the district court the power to control "abuses of Rule 15." And such amendments are common in habeas corpus proceedings.

When the district court appoints counsel, as in this case (Pet. App. C6), the habeas petitioner will almost certainly be able to file an amended petition before a responsive pleading is due. Moreover, a motion to dismiss for failure to exhaust all claims does not count as a responsive pleading under Rule 15(a). 3 J. Moore et al., *Moore's Federal Practice* § 15.11, at 15-15, 15-16 (3d ed. 2004). And in the Ninth Circuit and the Seventh Circuit, where *Ellzey* was decided, a habeas petitioner would be able to amend his initial petition as a matter of course even after the court granted a motion to dismiss, so long as there was no final judgment. 3 J. Moore, et al., *Moore's Federal Practice* § 15.12[1], at 15-16.2 (3d ed. 2004) (citing *Mayes v. Leipziger*, 729 F.2d 605, 607-08 (9th Cir. 1984) and *Camp v. Gregory*, 67 F.3d 1286, 1289 (7th Cir. 1995)).

The Ninth Circuit's reliance on Rule 15(a) is equally flawed with respect to amendments submitted after a responsive

pleading has been filed. Rule 15(a) directs the court to allow leave to amend in such instances "when justice so requires." Fed. R. Civ. P. 15(a). "The policy in favor of allowing amendments is extremely liberal." 3 J. Moore et. al., *Moore's Federal Practice* § 15.14[1], at 15-27, 15-28 (3d ed. 2004). "In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, *futility of amendment*, etc.--the leave sought should, as the rules require, be 'freely given.'" *Foman v. Davis*, 371 U.S. 178, 182 (1962) (emphasis added).[8/]

Nowhere in AEDPA, however, is it suggested that Congress intended its limitations period to apply at the discretion of district courts under Rule 15(a). Under the Ninth Circuit's reasoning, district courts no longer need to be concerned with Rule 15(c) when applying Rule 15(a); district court will have the discretion to allow virtually every new claim to be added, regardless of their lack of relation to the claims in the original petition. All of the problems discussed in §§ (A)(1) and (A)(2), *supra*, will therefore come to fruition under the "extremely liberal" amendment policy of Rule 15(a), lessened only by the district court's occasional decision not to allow an amendment. That certainly is not the scheme envisioned by Congress. Rule 15(c)(2), as construed by the Ninth Circuit, remains fatally inconsistent with AEDPA.

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8. "A district court may properly deny a motion to amend as futile if the proposed amendment would be barred by the statute of limitations." *Rodriguez*, 286 F.3d at 980; *see Moore v. Baker*, 989 F.2d 1129, 1131-32 (11th Cir. 1993) (lower court did not abuse discretion by denying leave to amend because the amended complaint containing new claims did not relate back to the original complaint and could not withstand a motion to dismiss on statute of limitation grounds).

B. Unlike The Ninth Circuit's Approach, The Warden's Interpretation Of Rule 15(c)(2) Is Consistent With The Rule's Proper Application In Ordinary Civil Cases

Properly construed, Rule 15(c)(2) does not allow relation back of every amended claim. Rather, it limits the set of claims that relate back to those which arose from the same "conduct, transaction, or occurrence" as a claim in the initial, timely pleading. The Ninth Circuit's interpretation of Rule 15(c)(2)'s application in habeas proceedings, however, vitiates that limitation, for it allows *all* amended habeas claims to relate back. This alone is enough to establish that it is an erroneous construction of the rule. But another fundamental reason exists as to why the Ninth Circuit's construction is wrong, and the Warden's is correct. Only the Warden's construction of Rule 15(c)(2) is consistent with the fair-notice policy underlying the rule and, thus, only the Warden's construction is consistent with how the rule applies in other civil contexts.

1. The Ninth Circuit's Reasoning Conflicts With The Policy Of "Fair Notice" That Informs The Relation Back Doctrine

In demarcating that narrow set of claims that relate back under Rule 15(c)(2), the key inquiry is "whether the opposing party has been put on notice regarding the claim or defense raised by the amended pleading. . . . A failure of notice will prevent relation back." 6A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 1497, at 85-86, 89 (2d ed. 1990); 3 J. Moore et al., *Moore's Federal Practice* § 15.19[2], at 15-83, 15-84 (3d ed. 2004) (factors a court should consider in determining whether a claim arose from the same conduct, transaction or occurrence include: (1) whether defendant had notice of the claim that plaintiff is now asserting; (2) whether

plaintiff will rely on the same kind of evidence offered in support of the original claim to prove the new claim; and (3) whether unfair surprise to defendant would result if the court allowed the amendment to relate back). This Court recognized the role of fair notice in Rule 15(c) in *Tiller v. Atlantic Coast Line R. Co.,* 323 U.S. 574 (1945), a case relied on by Felix in his Brief in Opposition (at 10-11).

a. The "Fair Notice" Policy Has Arisen In Civil Contexts To Illuminate The Parameters Of The Relation Back Doctrine

In *Tiller*, 323 U.S. 574, an action was brought against a railroad by the wife of a railroad employee who was killed on the job when a railroad car struck him. At issue was whether the three-year limitation period provided by the Federal Employers' Liability Act (FELA), the initial basis for the wife's suit, barred an amended claim resting on the Boiler Inspection Act. *Id.* at 580-81. The Court determined that the amended complaint, which charged the railroad with failing to have the locomotive properly lighted, related back to the original complaint, which alleged liability under FELA based on the railroad's failure to provide a proper lookout for the deceased, give him proper warning of the approach of the train, keep the head car properly lighted, and warn the deceased of an unprecedented and unexpected change in the manner of shifting cars. *Id.* at 577, 581.

The Court determined that "[t]here is no reason to apply a statute of limitations when, as here, the respondent has had notice from the beginning that petitioner was trying to enforce a claim against it because of the events leading up to the death of the deceased in respondent's yard." *Id.* at 581. *Tiller* thus establishes that this Court long ago recognized the importance of fair notice in applying Rule 15(c).

Moreover, *Tiller* exemplifies that, in effectuating this fair notice objective, the facts underlying the specific claim provide the proper level of generality in determining the "conduct, transaction, or occurrence" to which Rule 15(c)(2) refers. In *Tiller*, the core facts supporting the original claims also supported and provided notice of the new claim—both related to the proper lighting of the train.

Courts applying Rule 15(c)(2) in a variety of civil contexts have similarly looked to the facts underlying the specific claims when determining whether a new claim's "conduct, transaction, or occurrence" were set forth in the initial pleading. The Ninth Circuit and other courts have accordingly found insufficient notice in some cases even where the new claim and the earlier claim both stemmed from the event that gave rise to the cause of action, such as termination of employment. For example, in *Percy v. San Francisco General Hosp.*, 841 F.2d 975, 977-79 (9th Cir. 1988), the court determined that an amended complaint under 42 U.S.C. § 1983, alleging denial of due process in the Civil Service Commission hearing that resulted in Percy's termination did not relate back to his original claim of racial discrimination in his termination. Similarly, in *Nettis v. Levitt*, 241 F.3d 186, 193 (2d Cir. 2001), the court held that a terminated employee's allegation that his employer retaliated against him after he objected to the discontinuation of sales-tax collection did not relate back to his original complaint, which alleged that the employer had retaliated after the employee made a report of financial wrongdoing and theft by co-workers.

The same result has obtained in non-employment related actions. *See, e.g., Moore v. Baker*, 989 F.2d 1129, 1130-32 (11th Cir. 1993) (patient's claims that surgeon was negligent during and after coronary surgery did not arise out of the same "conduct, transaction, or occurrence" as claim set forth in original complaint, *viz.*, that doctor failed to inform the patient before obtaining her consent for surgery that there was an available alternative to the surgery); *Fuller v. Marx*, 724 F.2d at 720-21 (new claim of a cover up by the medical examiner did

not relate back to an earlier complaint alleging a negligently performed autopsy, even though both claims arose from the same autopsy).

b. The Ninth Circuit's Sweeping Interpretation Of Rule 15(c)(2) Is Inconsistent With The "Fair Notice" Policy

The filing of an initial habeas corpus petition to contest a criminal judgment on one ground does not put the opposing party on fair notice of all the possible claims stemming from pre-trial motions, the trial, or sentencing. For example, it is not reasonable to conclude that the filing of a habeas petition that contains a single claim of instructional error provides fair notice of, *inter alia*, any of the following types of claims:

- a speedy trial violation
- malicious prosecution
- improper exercise of a peremptory challenge against a juror
- ineffective assistance of counsel for failure to give proper plea advice
- incompetency to stand trial
- erroneous admission of evidence
- shackling
- jury misconduct
- cruel and unusual punishment

Yet, under the Ninth Circuit's overly generalized relation back doctrine, the State would be deemed to have notice of all of these potential claims simply because a prisoner had filed a petition raising a single claim of instructional error. That is unrealistic. A habeas petitioner would be relying on one set of facts in the trial record to support the initial claim of

instructional error and on an entirely different set of facts or evidence to prove any of the above-mentioned new claims. Further, it is also possible that the evidence in support of a new claim relies on evidence that is not even part of the record of the trial, such as when the petitioner claims that his trial attorney failed to provide effective assistance of counsel because the attorney was racially biased against him. The state cannot anticipate such a claim. Given the underlying policy of Rule 15(c), the "conduct, transaction, or occurrence" in habeas proceedings that challenge a criminal judgment are the underlying facts of a specific claim.

In this case, the Ninth Circuit focused on the fact that Felix's Confrontation Clause claim and his involuntary statements claim are both predicated on the admission of evidence at trial rather than on conduct prior to trial, which had allegedly rendered the evidence inadmissible. (J.A. 13.) Again, the fact that the claims arose from the same trial does not satisfy the underlying policy of fair notice. Even focusing on the admission of evidence, a challenge to the admission of one specific piece of evidence does not mean the opposing party has fair notice of a challenge to an entirely different piece of evidence. There are simply too many pieces of evidence in a given criminal trial to warrant such a rule.

Felix's initial petition included a claim that the trial court improperly admitted portions of a videotaped interview given by Kenneth Williams on February 4, 1994, based on an asserted violation of Felix's right to confront witnesses. That did not provide fair notice that Felix would subsequently add a new claim that Detective Gardner's testimony regarding Felix's allegedly involuntary statements on October 28, 1993, violated Felix's rights to due process and against self-incrimination. (Compare Pet. App. G and Pet. App. I.) The initial petition likewise did not give fair notice that Felix would later raise a claim of ineffective assistance of appellate counsel based on a failure to assert the involuntary statement claim on appeal. The district court correctly determined that the new involuntary

statement claim arose out of a different "core of facts," and therefore did not relate back to the initial petition. (Pet. App. B, D7-9.)

Lack of notice has been the basis for other circuits' rejection of the Ninth Circuit's broad interpretation of the "conduct, transaction, or occurrence" language of Rule 15(c)(2) in habeas proceedings. *See, e.g., Hicks*, 283 F.3d at 389 (relation back allowed only where original motion provides adequate notice of new claims); *Craycraft*, 167 F.3d at 457 (original petition did not provide sufficient notice of different claim of ineffective assistance of counsel). As Judge Edwards wrote for the D.C. Circuit in *Hicks*:

> [W]hile an amendment offered for the purpose of adding to or amplifying the facts already alleged in support of a particular claim may relate back . . . one that attempts to introduce a new legal theory *based on facts different from those underlying the timely claims* may not . . . . These principles are faithful both to the underlying purposes of Rule 15(c) and to the concerns about drawn-out and unlimited collateral attacks on federal criminal judgments evinced by the passage of AEDPA. They ensure that relation back will be allowed only where the original motion provides adequate notice of the prisoner's claims and that proposed amendment would neither change the fundamental nature of those claims nor prejudice the Government's defense by requiring it to prepare its case anew. . . .

283 F.3d at 388-89 (emphasis added).

The absence of fair notice under the Ninth Circuit rule is particularly acute when the new claim sought to be added to the initial petition was not asserted either on direct appeal or on one or more rounds of post-conviction review in state courts. This Court has long held that any petition containing even one claim that has not been exhausted in state court must be dismissed.

Pliler v. Ford, 124 S. Ct. at 2444 (citing *Rose v. Lundy*, 455 U.S. 509 (1982)); see 28 U.S.C. § 2254(b)(1). "A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." 28 U.S.C. § 2254(b)(3). Absent an express waiver, the State can be confident that the federal court will apply the exhaustion requirement and can expect that any claim to be addressed in federal court will first be raised in state court on direct appeal or on post-conviction review. Accordingly, if a specific claim is not raised in state court, there is no reason for the State to anticipate that the specific claim will be raised in federal court. *Cf. Wilson v. Fairchild Republic Co., Inc.*, 143 F.3d 733, 739 & n.6 (2d Cir. 1998) (not an abuse of discretion to hold that opposing party did not have fair notice of new claim because the new claim had not been administratively exhausted and thus could not have been properly included in the original pleading).

The State's reliance on the exhaustion requirement is thus an additional consideration in determining if the State was put on fair notice of new claims. Where, as in this case, a newly asserted and unexhausted claim is based on different legal theories and stems from different facts than those underlying the original claim, it cannot reasonably be concluded that the State had fair notice of that new claim.

This refutes the Ninth Circuit's assertion that "[i]t unduly strains the usual meaning of 'conduct, transaction and occurrence' to regard a criminal trial as a series of perhaps hundreds of individual occurrences." (J.A. 11 (citing *Ellzey*, 324 F.3d at 526 ("this is not how the phrase 'conduct, transaction, or occurrence' is used in civil practice")). Quite the contrary, such a construction is compelled by the policy of ensuring fair notice. According to the Ninth Circuit, Felix's initial petition brought his trial and conviction to the attention of the State, and therefore the State could anticipate an amended pleading containing any and all additional claims of constitutional error that could arise from any part of that trial.

(See J.A. 14.) But this would afford little or no notice at all of the belated claims. A habeas action is about whether a constitutional right was violated–and in any trial, any number of constitutional rights may be implicated by any one of a number of transactions, occurrences, or courses of conduct.

2. The Idea Of "Same Transaction," As Used To Address Issues Of Res Judicata And Compulsory Joinder In Civil Proceedings, Is Inappropriate In The Context Of Habeas Corpus Proceedings

The Ninth Circuit relied on the following reasoning from *Ellzey*:

> [T]he phrase "conduct, transaction, or occurrence" . . . sums up the "same transaction" approach to the law of preclusion (and thus to compulsory joinder): all legal issues and claims for relief arising out of a single transaction may (and often must) be raised together, and Rule 15(c) specifies that anything that would be barred, if not brought now, may be added and litigated. . . .

Ellzey, 324 F.3d at 526, *quoted in* J.A. 11. That argument fails on several levels.

First, *Ellzey's* statement as to what Rule 15(c) specifies is not reflected in the language of the rule and appears simply to be the court's own test for determining what constitutes "conduct, transaction, or occurrence." Second, a mechanical test for applying Rule 15(c) does not take into account the different purposes behind the law of preclusion, compulsory joinder, and the relation-back doctrine in Rule 15(c). It also does not consider the extent to which claim preclusion and compulsory joinder even apply to habeas proceedings.

"The related doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion) are meant to protect

parties from having to relitigate identical claims or issues and to promote judicial economy." *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 162 F.3d 724, 731 (2d Cir. 1998). The underlying purpose of compulsory joinder under Federal Rule of Civil Procedure 13(a) is "to enable the court to settle all related claims in one action, thereby avoiding a wasteful multiplicity of litigation on claims arising from a single transaction or occurrence." 6 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1409, at 46 (2d ed. 1990). Rule 15(c), however, addresses an altogether different concern.

> Because the rationale of the relation back rule is to ameliorate the effect of the statute of limitations, *rather than to promote the joinder of claims and parties, the standard for determining whether amendments qualify under Rule 15(c) is not simply an identity of transaction test*; although not expressly mentioned in the rule, the courts also inquire into whether the opposing party has been put on notice regarding the claim or defense raised by the amended pleading.

6A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1497, at 85 (2d ed. 1990) (emphasis added; footnote omitted). The Ninth Circuit's overly broad reading of "conduct, transaction, or occurrence" in habeas proceedings would permit relation back of new claims that were totally unanticipated by the responding party.

Finally, "ordinary principles of res judicata do not apply in habeas corpus." *Lonchar v. Thomas*, 517 U.S. 314, 339 (1996) (Rehnquist, C.J., concurring); *see Felker v. Turpin*, 518 U.S. 651, 664 (1996) ("new restrictions on successive petitions constitute a modified res judicata rule").[9/] And compulsory

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9. Even if claims do not relate back under Rule 15(c)(2), a habeas petitioner will have a statutory right to present new claims in a current petition or in a successive petition under certain circumstances. See 28

joinder under Rule 13(a) has no apparent application to habeas corpus petitions that challenge a criminal judgment. Accordingly, the "same transaction" approach taken in claim preclusion and compulsory joinder should not influence the application of Rule 15(c)(2) to habeas proceedings.

3. The Warden's Interpretation Of Rule 15(c)(2), Does Not Nullify Application Of The Relation Back Doctrine To Habeas Proceedings

The Ninth Circuit's view that the narrower construction of Rule 15(c)(2) endorsed by the Warden would nullify the rule's applicability to habeas proceedings (see J.A. 11) is unfounded. The Warden's interpretation of Rule 15(c)(2) will allow relation back even if there are different claims, so long as they arise from the "same set of facts," "not from separate conduct or a separate occurrence in both 'time and type.'" *Davenport*, 217 F.3d at 1344. For example, in *Mandacina v. United States*, 328 F.3d 995, 1000-01 (8th Cir. 2003), the court held that since both the original and amended claims under *Brady v. Maryland*, 373 U.S. 83 (1963), related to evidence obtained by the same police department and were factually similar in both "time and type," the new *Brady* claim alleging that the government failed to disclose a particular report related back to the original motion. In *Woodward v. Williams*, 263 F.3d at 1142, the court held that a new claim that the trial court violated the petitioner's rights by not allowing him to introduce evidence that certain statements had been recanted related back to the petitioner's claim that his due process rights were violated when the court allowed the recanted statements to be introduced.

U.S.C. § 2244(d)(1)(B), (C) & (D) (specifying circumstances under which the limitations period is deemed tolled); 28 U.S.C. § 2244(b)(2) (specifying circumstances under which a habeas petitioner may bring a second or successive petition).

Moreover, courts generally "will allow relation back when the new claim is based on the same facts as the original pleading and only changes the legal theory." 3 J. Moore et al., *Moore's Federal Practice* § 15.19[2], at 15-82 (3d ed. 2004). Undoubtedly, there will be instances in which that will occur in habeas corpus proceedings. For example, the same core of facts may give rise to a defendant's challenge to admission of statements he made to police based on the Fifth Amendment right recognized in *Miranda v. Arizona*, 384 U.S. 436 (1966), and based on the Sixth Amendment right recognized in *Massiah v. United States*, 377 U.S. 201 (1964). *See e.g., Cahill v. Rushen*, 678 F.2d 791, 797 (9th Cir. 1982) (Wallace, J., dissenting) (describing circumstances in the case that gave rise to *Massiah* and *Miranda* claims). Assuming that the habeas petitioner asserted only one of those claims in a timely-filed petition, the rule advocated by the Warden would allow for relation back of the new claim.

CONCLUSION

The judgment of the court of appeals should be reversed.

Dated: February 15, 2005

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

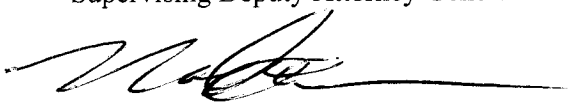
MANUEL M. MEDEIROS
State Solicitor General

ROBERT R. ANDERSON
Chief Assistant Attorney General

MARY JO GRAVES
Senior Assistant Attorney General

JANET E. NEELEY
Supervising Deputy Attorney General

WARD A. CAMPBELL
Supervising Deputy Attorney General



MATHEW CHAN
Deputy Attorney General
Counsel of Record

Counsel for Petitioner

APPENDIX

Section 2244 of Title 28 of the United States Code provides in pertinent part:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --
>
> (A) the date on which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Section 2254 of Title 28 of the United States Code provides in pertinent part:

> (b)(1) An application for writ of habeas corpus on behalf

of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that–

(A) the application has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

. . . .

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

Rule 11 of the Rules Governing Section 2254 cases states:

The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.

Rule 13 of the Federal Rules of Civil Procedure states in pertinent part:

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

Rule 15 of the Federal Rules of Civil Procedure provides in pertinent part:

(a) Amendments. A party may amend the party's

pleading once as a matter of course at any time before a responsive pleading is served. . . . Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . .

. . . .

(c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when . . . ¶ (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading . . . .

Rule 81of the Federal Rules of Civil Procedure provides:

(a) To What Proceedings Applicable. . . .

(2) These rules are applicable to proceedings for . . . habeas corpus . . . to the extent that the practice in such proceedings is not set forth in statutes of the United States, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings, and has heretofore conformed to the practice in civil actions.